SUPREME COURT, U. S.

DEC 4 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 796

THE DREDGE CORPORATION, a Nevada Corporation,
Petitioner,

vs.

J. RUSSELL PENNY, etc.,
Respondent.

THE DREDGE CORPORATION, a Nevada Corporation,
Petitioner,

vs.

E. J. PALMER, etc.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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E. J. PALMER, etc.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered June 26, 1968.

Opinions Below.

The Judgment of the United States Court of Appeals for the Ninth Circuit was made and entered June 26, 1968. Reported in .... F. 2d ..... A copy thereof is appended in this Petition in the Appendix at pages 5-13.

A Petition for Rehearing filed by the Dredge Corporation was denied on Sept. 30, 1968.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

A motion to stay judgment until Nov. 1, 1968 was granted for filing this Petition for writ of certiorari.

Statutes Federal Rules and Regulations Involved.

Articles I and II of the United States Constitution.

The pertinent portions of Articles V and XIV of Amendments to the Constitution of the United States.

The Mining Laws of the United States, as amended, (30 U.S.C. Sec. 21, *et seq.*).

The Administrative Procedure Act of the United States, 5 U.S.C., Ch. 19, Par. 1001 *et seq.* (Now Chap. 5, Secs. 500, *et seq.*).

The Common Varieties Act of July 23, 1955, 30 U.S.C. 611.

Questions Presented.

These are consolidated cases involving the validity of thirty six sand and gravel placer Mining Claims located on public land in Clark County, Nevada. All of the claims are owned by the Dredge Corporation, a Nevada Corporation.

Petitioner filed its complaint in the United States Court for the District of Nevada for review of agency action which invalidated petitioner's mining claims.

Summary judgment, by the District Court was granted in favor of the Dept. of Interior.

Petitioner appealed this judgment to the United States Court of Appeals for the Ninth Circuit. The judgment of the United States Court for the District

of Nevada was reversed and the cases remanded for further proceedings.

The United States Court for the District of Nevada on remand entered Judgment in favor of Petitioner whereupon an appeal was taken by the Dept. of Interior to the Court of Appeals for the Ninth Circuit.

The judgment questioned herein then followed in favor of the Dept. of Interior, June 26, 1968.

Petition for rehearing by Dredge was denied. Judgment was then stayed until Nov. 1, 1968 so this petition for writ of Certiorari could be filed.

The questions presented are

1. Was the so-called "marketability at a profit" test ever published in the Federal Register? Was it ever published in the Code of Federal Regulations or in pamphlets given to the public? If not is it invalid under the Administrative Procedure Act (5 U.S.C. 552(a)(1)(E).)?

2. Is the "marketability at a profit" test unconstitutional because it is vague, indefinite and uncertain?

3. Can the Common Varieties Act (30 U.S.C. 611) be applied against these mining claims, contrary to its express provisions in several paragraphs, excluding mining claims located prior to passage of the Act?

Statement.

I.

This action arose out of administrative proceedings by the Dept. of Interior declaring petitioners thirty six placer mining claims (located in 1952), to be null and void.

The Administrative decisions are based on the so called "marketability at a profit" test and the Common Varieties Act. (30 U.S.C. 611.)

The Supreme Court of the United States in its decision of April 22, 1968, *United States v. Alfred Coleman,* states that the "Marketability at a Profit" test is "* * * a logical complement to the 'prudent man test' * * *". This new test is then an addition or amendment to the prudent man rule, and under the Administrative Procedure Act (5 U.S.C. §552) (originally passed in 1946) should have been published in the Federal Register and Code of Federal Regulations.

To refresh the Court's recollection we call attention to a series of pamphlets issued by the Department of the Interior from time to time, almost every year. They are entitled "Lode and Placer Mining Regulations". Appellees procured one such pamphlet before starting their locations in 1952. Others we have are numbered Circular No. 1785, February 1, 1951; Circular No. 1941 amended to include November 1, 1955, etc.; the latest such pamphlet we have is dated July 10, 1964. None of them mention "Marketability at a Profit". One pamphlet is entitled: "Mining Claims; Questions and Answers". It is dated 1963. We quote from the bottom of page 3 and at the top of page 4:

> "There must be an actual physical discovery of mineral on each and every claim and this discovery must satisfy the 'prudent man' rule. *Commercial grade ore is not required* but mere traces, isolated bits of mineral or minor indications are not sufficient to satisfy the 'prudent man' rule." (Emphasis added).

Please note that this pamphlet is issued eight years after the passage of the 1955 law, and nothing is said in the pamphlet in regard to "marketability at a profit". We call attention to the following language in the above quotation: "COMMERCIAL GRADE ORE IS NOT REQUIRED * * *"

In other words the public is not informed by the Department of the Interior about the new and additional test of "marketability at a profit".

The Department of the Interior is, of course, bound by its own regulations and particularly the information given to interested members of the public for their guidance. This is not a matter of estoppel but plain honesty.

In the various pamphlets referred to, a careful examination will show that "marketability at a profit" is not referred to, so that the public knows nothing about it after reading the government pamphlets and, based thereon, locating mining claims under the old, well known, "prudent man" test.

The "prudent man" test, in use since 1894, has been approved by the Supreme Court of the United States in a number of cases; one of the latest decisions being *Best v. Humbolt Placer Mining Company,* 371 U.S. 334 (Jan. 14, 1963), with no reference to "marketability at a profit".

The "marketability at a profit" test being an addition to the "prudent man rule" in order to be of legal effect must have been published in the Federal Register as provided by the Administrative Procedure Act, 5 U.S.C. §552(a)(1), particularly subsection E which provides that:

> "* * * each amendment, revision or repeal of the foregoing"

must be so published.

Said §552 further provides:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *"

Since the "marketability at a profit" test was not published by the Department of the Interior in the Federal Register to inform the public how to locate mining claims on the public domain; is not publicized in pamphlets; said test is illegal and ineffective as to Dredge Corporation's mining claims in these cases.

II.

The phrase "marketability at a profit is unconstitutional because it is vague, indefinite and uncertain.

What does "market" mean, and what does "profit" mean in the additional clause "marketability at a profit" which the Department has added to the prudent man rule? The term is vague, indefinite and uncertain.

The Supreme Court of the United States has repeatedly declared laws invalid because they are vague and uncertain. In the term of that court just closed there are at least two cases which decide this question.

(a) *Zwickler v. Koota,* 389 U.S. 241 (Dec. 5, 1967), 88 S. Ct. Rptr. 391.

(b) *Interstate Circuit Inc. v. City of Dallas,* decided April 27, 1968, 88 S. Ct. Rptr. 1299, 1303.

For another late case on vagueness, see *Keyishian v. Regents of New York University,* in connection with the New York loyalty oath law, 385 U.S. 589, 87 S. Ct. Rptr. 675 (decided January 1967).

Every requirement and condition of the mining laws are spelled out with exactitude except "marketability at a profit."

For example a lode claim is 600 feet wide by 1500 feet long by statute. Location work to perfect the claim requires 240 cubic feet of mineral be removed in the discovery pit.

A placer claim is 20 acres in extent. Association placer mining claims may be not more than 160 acres for eight locators.

Annual assessment work to hold title to a lode or placer claim must be $100.00 per year and an affidavit recorded showing the annual work has been performed.

To qualify a lode or placer claim for patent requires that $500.00 worth of development work must have been performed.

There is nothing vague, indefinite or uncertain in these requirements and conditions to comply with Federal and state mining laws.

Now as to "marketability at a profit" what needs to be shown to qualify a lode or placer mining claim for patent?

Inasmuch as $500.00 worth of *development* work is required to qualify a lode or placer claim for patent would this sum as profit meet the requirements?

Would profit for one year be sufficient to satisfy the "marketability at a profit" rule, or must the term be five years, ten years or more?

Will profit in excess of $500.00 be required and if so how much—$1000.00, $5000.00 or $50,000.00? No one knows the answers to these simple questions, therefore the term "marketability at a profit" is not only illegal because never published in the Federal Register, in the Code of Federal Procedure or in pamphlets it is also unconstitutional and void because it is vague, uncertain and indefinite.

III.

Can the Common Varieties Act (30 U.S.C. 611) be applied to mining claims located prior to its passage?

The act provides saving clauses for mining claims located *prior* to its passage.

No law can be applied retroactively unless it contains a provision authorizing such retroactive application.

The Common Varieties Act (30 U.S.C. 611) does not contain any provision for retroactive application. On the contrary the act contains a saving clause (repeated in many Sections) protecting mining claims located prior to its passage.

IV.

In the case of *Emil L. Krushnic v. U.S.,* 280 U.S. 305 (1930) this court stated:

> "The rule has been established by innumerable decisions of this court, and of state and lower Federal Courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of the term. . . .".

In view of the above to permit this Dept. of Interior to deprive Petitioner of its mining claims (property) without compensation is unconstitutional and a denial of due process of law.

V.

Reasons for Granting the Writ.

The decisions below should be reviewed because they erroneously overlook the requirements of the Administrative Procedure Act, 5 U.S. Code, Section 552, particularly subsection E which provides that ". . . each amendment, revision or repeal of the foregoing must be published in the Federal Register." This would include the so called "Marketability at a profit" rule.

Also Section 1002 of said act passed in 1946 further provides:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ."

The Courts below have erroneously overlooked that the so-called "Marketability at a profit" requirement is unconstitutional because it is vague, indefinite and uncertain.

The Courts below have erroneously overlooked the saving clause in the Common Varieties Act (30 U.S.C. Sec. 611) which exempts from provisions of the act mining claims located prior to its passage.

Finally the Courts below have failed to realize that the Petitioner's Constitutional rights have been violated

by taking its property (mining claims) without compensation and without due process of law.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted

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APPENDIX A.

The Common Varieties Act of July 23, 1955.

Title 30 U.S.C. 611: (July 23, 1955, c. 375, sec. 3, 69 Stat. 368, amended Sept. 28, 1962, Pub. L. 87-713, Sec. 1, 76 Stat. 652.)

Sec. 611. COMMON VARIETIES OF SAND, STONE, GRAVEL, PUMICE, PUNICITE, OR CINDERS, AND PETRIFIED WOOD

No deposit of common varieties of sand, stone, gravel, pumice, punicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity *to any mining claim hereafter located under such mining laws: Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common Varieties" as used in sections 601, 603 and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the placement of wood by silica or other matter. (Emphasis added.)

The following sections of the Act also limit the law to "mining claim hereafter located". Sec. 612(a)(b)(c).

Section 615 contains provisions protecting the rights of claimants of mining claims located prior to the passage of the Common Varieties Act on July 23, 1955.

APPENDIX B.

5 U.S.C.—Chapter 5—Administrative Procedure Act

§552. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this

paragraph to be made available or published. (A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

APPENDIX C.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

E. J. Palmer, State Supervisor, Bureau of Land Management and James E. Keogh Jr., Manager of Reno, Nevada, Land Office, Bureau of Land Management, Department of the Interior, *Appellants,* vs. The Dredge Corporation, a Nevada corp., *Appellee.* No. 21,435.

J. Russell Penny, State Supervisor, Bureau of Land Management, and Harold C. Hammitt, Manager of Reno, Nevada, Land Office, Bureau of Land Mangement, Department of the Interior, and John Does 1-300 and Jane Does 1-300, inclusive, *Appellants,* vs. The Dredge Corporation, a Nevada corp., *Appellee.* No. 21,436.

[June 26, 1968]

Appeal from the United States District Court for the District of Nevada.

Before: Barnes, Hamley and Browning, Circuit Judges.

Hamley, Circuit Judge:

These are consolidated appeals from judgments entered in companion district court cases involving the validity of thirty-six sand and gravel mining claims located on public lands. All of the claims are owned by The Dredge Corporation (Corporation), which is the plaintiff and appellee in each case.

Twenty-eight of the claims are involved in a suit in which E. J. Palmer, Nevada State Supervisor, Bureau

of Land Management (Bureau), United States Department of the Interior (Department), and others, are defendants and appellants. The remaining eight claims are involved in a suit in which J. Russell Penny, a successor state supervisor of the Bureau, and others, are defendants and appellants.[1]

All of the claims, based on the asserted discovery of sand and gravel deposits, were located on various dates ranging from July 12 to July 28, 1952. In order for these claims to be valid it is necessary that the discovered mineral deposits be "valuable." Rev. Stat. 2319 (1875), 30 U.S.C. § 22 (1964). The Secretary of the Department is charged with seeing that valid claims are recognized, invalid ones are eliminated, and the rights of the public preserved. *Cameron v. United States,* 252 U.S. 450, 460.

In fulfillment of this responsibility, a contest proceeding was initiated before the Bureau on October 4, 1955, involving the twenty-eight claims embraced in the Palmer case. In the charges it was alleged, among other things, that minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery. On December 18, 1957, a similar contest proceeding was instituted involving the eight claims embraced in the Penny case.

In determining the validity of these claims the critical question of fact was whether the discovered deposits of sand and gravel were "valuable" within the meaning of 30 U.S.C. § 22. The general test applied by the examiner in ascertaining whether the deposits were valuable

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[1]The two cases will be referred to herein as the Palmer and Penny cases.

was the "prudent man" test which the Secretary has been using since 1894.[2] As a further refinement of the test, the examiner held, relying on *Layman v. Ellis,* 52 L.D. 714 (1929), and subsequent opinions of the Solicitor General, that in the case of a mining claim located for sand and gravel it must be shown that the deposits can be extracted, removed, and marketed at a profit—the so-called "present marketability" test.

Taking into consideration the evidence produced at the agency hearing, and applying the tests referred to above, the examiner in the contest involving the twenty-eight Palmer claims determined that twenty-two claims were null and void for lack of a valid discovery of minerals. He held that there was a valid discovery as to the remaining six claims in that case and that those claims were valid.

Both the Corporation and the Government appealed to the director of the Bureau. The director entered a decision holding that all twenty-eight claims were null and void for lack of a valid discovery of minerals, thereby affirming the examiner as to twenty-two claims and reversing him as to six. The Corporation appealed to the Secretary of the Interior (Secretary). The deputy solicitor of the Department, acting on behalf of the Secretary, affirmed the decision of the director.

In the contest involving the eight Penny claims, the examiner, appraising the evidence in the light of the

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[2]This test was first announced in *Castle v. Womble* 19 L.D 455, 457 (1894), and was there stated as follows:

> "[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

tests referred to above, determined that all eight claims were null and void for lack of a valid discovery of minerals. The Corporation appealed to the director of the Bureau who entered a decision affirming the examiner's decision. The Corporation then appealed to the Secretary. The deputy solicitor, acting on behalf of the Secretary, affirmed the decision of the director.[3]

The Corporation then commenced these two actions in the United States District Court for the District of Nevada, injunctive and declaratory relief being sought. In each case defendants moved for a summary judgment, and the motions were granted. Appeals were taken and we reversed without reaching the merits, holding that plaintiffs had been denied the right of oral argument on the motions for summary judgment. *The Dredge Corporation v. Penny,* 9 Cir., 338 F.2d 456.

After the cases were returned to the district court oral argument was had on the motions for summary judgment, and the motions were denied. The cases were thereafter submitted for decision, on March 21, 1966, under the terms of a pretrial order, the administrative record, briefs and oral argument.

Before decisions were rendered by the district court, this court, on June 21, 1966, filed an opinion in *Coleman v. United States,* 9 Cir., 363 F.2d 190, adhered to on petition for rehearing, 379 F.2d 555. In that opinion, this court disapproved the Department's rule, applied by the agency in *Coleman,* and in the cases now

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[3]Before the office of the Secretary acted on the Palmer and Penny agency appeals, *Foster v. Seaton,* D.C. Cir., 271 F.2d 836, was decided, in which the Department's "present marketability" test was approved. In the Secretary's decisions in the Palmer and Penny contests *Foster v. Seaton* was therefore referred to as additional authority sanctioning such a test.

before us, that for sand and gravel deposits to be regarded as "valuable" within the meaning of 30 U.S.C. § 22, it must be shown that the mineral can presently be extracted, removed and marketed at a profit.

On the authority of the decision of this court in *Coleman,* the district court, on August 8, 1966, entered judgments for plaintiffs in the *Palmer* and *Penny* cases. The court ordered that those cases be remanded to the Department for further consideration in the light of *Coleman.* These appeals followed.

Having in view the primary basis for the district court judgments, it is not surprising that a substantial part of the briefs on appeal in the cases now before us are devoted to the question of whether our *Coleman* decision is controlling so as to require affirmance of the district court judgments. Appellee Corporation, of course, takes the position in its brief that we must affirm in the light of our opinion in *Coleman.*

Unfortunately for the Corporation, however, our *Coleman* decision was reversed by the Supreme Court just eighteen days before the oral argument on these appeals. *United States v. Coleman,* .... U.S. .... decided April 22, 1968. The Supreme Court held that the so-called "present marketability" test is a logical complement to the "prudent man" test and an appropriate way to identify, with greater precision and objectivity, the factors relevant to a determination that a mineral deposit is "valuable."

The Supreme Court decision in *Coleman* necessarily presents the *Palmer* and *Penny* appeals in a new posture, which counsel for the parties recognized at the oral argument. The prime line of contention then

switched from a discussion of the possible controlling effect of our decision in *Coleman,* to the question of whether the Secretary's decisions should be set aside on the ground that the findings of fact, on the basis of which the Secretary concluded that all of the claims are null and void, are not supported by a sufficient quantum of evidence.

As above indicated, the district court did not give specific consideration to this question, but instead decided the case on the ground that, under our decision in *Coleman,* the agency had applied an inappropriate test as to the value of the deposits. It would therefore be proper for us to remand the appeals to the district court for further consideration in the light of the Supreme Court decision in *Coleman.* Since, however, the agency record and the contentions of the parties with respect to the sufficiency of the evidence are fully before us, and in view of the length of time which has transpired since the Palmer and Penny contest proceedings were initiated in 1955 and 1957, we elect to proceed with the appeals and determine all of the issues at this time.

The Government argues that the decisions of the Secretary upon questions of fact in cases involving the public lands are "conclusive" in the courts. We do not undertake to decide whether this is so since, at the very least, the Secretary's findings of fact ought to be upheld if they are supported by substantial evidence.[4] They are so supported in this case.

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[4]This is the general test applied with respect to the sufficiency of the evidence to support administrative findings of fact. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 207. See also, *Adams v. United States*, 9 Cir., 318 F.2d 861, 873; and *Standard Oil Co. of California v. United States*, 9 Cir., 107 F.2d 402, 414, applying the substantial evidence test in public land cases.

In both the Palmer and Penny cases the agency produced expert testimony tending to prove that the sand and gravel deposits were not marketable and were otherwise without "value" in the sense intended by 30 U.S.C. § 22. The Corporation attacks the expertise of the Government witnesses and also the extent of their information concerning these particular lands. It also produced conflicting testimony with regard to the Palmer claims, but offered no evidence concerning the Penny claims.

As stated above, the hearing examiner found that six of the claims in the Palmer case were valid. These were claims numbers 52 through 57. The examiner found that these claims are located upon land which has high value for homesite purposes. As the examiner acknowledged, this finding gave application to the rule that where such circumstances are shown, proof of the mineral value of the deposit must be specific, clear and unequivocal.[5] Nevertheless, after weighing the conflicting evidence as to these six claims, the hearing examiner found that the sand and gravel deposits had the required value and concluded therefrom that those six claims are valid.

On his review of the hearing examiner's decision in the Palmer case, the Director of the Bureau reviewed the evidence adverted to by the examiner and found to the contrary concerning the value of the deposits on these six claims. Among other things, the Director found, in effect, that even in the claim Number 54 area, which was potentially the most valuable in this

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[5]See *United States v. Lillibridge*, S.D. Cal., 4 F.Supp. 204, 206; *United States v. Lavenson*, W.D. Wash., 206 F.2d 755; *Helen v. Wells*, 54 I.D. 306, 309 (1933).

group, the gravel is coated with a calcareous substance and is used only for road, parking lot and fill purposes. The Director also found that the market for materials of this quality in the Las Vegas area is "conjectural rather than actual or prospective." The Director accordingly concluded that these six claims, along with the other twenty-two claims in the Palmer case and the eight claims in the Penny case, are null and void.

The office of the Secretary affirmed the decision of the Director. In discussing the six claims of the Palmer case with regard to which the Director had set aside the examiner's finding of adequate value, the office of the Secretary pointed out that marketability had to exist prior to July 23, 1955, in order to fulfill the "present marketability" test. On that date, under 60 Stat. 368 (1955), as amended, 30 U.S.C. § 611 (1964), no deposits of "common varieties" of sand, stone, gravel, pumice, pumicite or cinders may be deemed a valuable mineral deposit within the meaning of the mining laws of the United States. The office of the Secretary found, in effect, that in view of the evidence, considered as a whole, no market for the sand and gravel on these six claims existed prior to July 23, 1955.[6]

In our opinion the findings of fact supporting the agency determination that all of the Palmer and Penny claims here in question are null and void are supported by substantial evidence.

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[6]The office of the Secretary further found that the only evidence of the existence of a market for the sand and gravel in these claims is in ". . . reference to a prospective market which may develop as a result of a future road building program under the Federal Highway Act."

The Corporation argues that the district court judgment setting aside the agency decision should be affirmed because the agency records are faulty and incomplete. We have looked into this matter and find the contention to be without merit. The omissions are minor, have no relevance to the issues before us, and are not, in our view, prejudicial.

The Corporation contends that the district court properly rejected the agency determination invalidating the Penny claims because the contest proceedings involving those claims were not commenced within the two-year period assertedly required by the proviso to section 7 of the Act of March 3, 1891, 26 Stat. 1098 (1891), as amended, 43 U.S.C. § 1165 (1964). However, as defendants point out, the Act of March 3, 1891 applies only to entrymen under the homestead, timber-culture, desert-land or pre-emption laws. It has no application to the mining laws or to persons making claims under the mining laws.

The judgments are reversed and the causes are remanded with directions to enter judgments for the defendants. As indicated above, the responsibility for this reversal rests with this court because of its erroneous decision in *Coleman,* which decision the district court was required to follow at the time the cases were before it.

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THE DREDGE CORPORATION, a Nevada Corporation,
Petitioner,

vs.

E. J. PALMER, etc.,
Respondent.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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APPENDIX D.

Judgment.

United States Court of Appeals for the Ninth Circuit.

E. J. Palmer, State Supervisor, Bureau of Land Management et al., Appellants vs.The Dredge Corporation, a Nevada corp., Appellee. No. 21,435.

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and the causes are remanded with directions to enter judgment for the defendant.

Filed and entered June 26, 1968.

APPENDIX E.

Judgment.

United States Court of Appeals for the Ninth Circuit.

J. Russell Penny, State Supervisor Bureau of Land Management, et al., Appellants, vs. The Dredge Corporation, a Nevada Corp., Appellee. No. 21436.

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and the causes are remanded with direction to enter judgment for the defendant.

Filed and entered June 26, 1968.

APPENDIX F.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Monday, September 30, 1968.

Before: Barnes, Hamley and Browning, Circuit Judges.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellee filed September 9, 1968 and within time allowed therefor, and valid extension thereof, by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX G.

Judgment.

In the United States District Court for the District of Nevada.

The Dredge Corporation, Plaintiff, vs. E. J. Palmer et al., Defendants. Civil No. 366.

The Dredge Corporation, Plaintiff, vs. J. Russell Penny et al., Defendants. Civil No. 396.

These consolidated cases were commenced by Plaintiff following contest proceedings instituted by the Department of Interior, taken against thirty-six sand and gravel placer mining claims of the Plaintiff. Following hearings before hearing examiners and review by the Director of the Bureau of Land Management, the Secretary of Interior held all the Plaintiff's claims to be invalid because of lack of discovery. Recently, the Ninth Circuit, in *Coleman et al v. United States,* No. 20,227, decided June 21, 1966, struck down the "present marketability" test of *Layman v. Ellis* and *Foster v. Seaton.* From a careful examination of the written decisions of the hearing examiners, the review and decisions on review of the Director of the Bureau of Land Management and of the Secretary of Interior, it is unclear to this Court whether the claims were held to be invalid applying the historic test of *Castle v. Womble* or under the present marketability test or that the claims were held to be invalid under a combination of both tests.

Therefore, the decision of the Secretary of Interior in both of these cases, invalidating Plaintiff's mining claims, is not in accordance with the law. Judgment is entered in favor of the Plaintiff and against the De-

fendant in both cases, reversing the decisions of the Secretary of Interior and remanding the cases to the Department of Interior for further proceedings and decisions in accordance with the standards established in *Coleman et al v. United States.*

Dated: August 8th, 1966.

/s/ Roger D. Foley
Roger D. Foley
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 796

THE DREDGE CORPORATION, PETITIONER

v.

J. RUSSELL PENNY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL OFFICERS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5–13) is reported at 398 F. 2d 791. Its opinion in an earlier phase of the case is reported at 338 F. 2d 456.

JURISDICTION

The judgments of the court of appeals were entered June 26, 1968. A timely petition for rehearing was denied on September 30, 1968. The petition for a writ of certiorari was filed on December 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

30 U.S.C. 22 provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the

> United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

QUESTION PRESENTED

Whether the Department of the Interior applied proper standards in determining whether discoveries of "valuable mineral deposits" had been made under the mining laws.

STATEMENT

In July 1952, petitioner located the 36 mining claims for sand and gravel involved here on land situated near Las Vegas, Nevada. In 1955 and 1957, administrative proceedings contesting the validity of these locations were initiated. These culminated in decisions that the locations were invalid, because there had been no discovery of "valuable mineral deposits." In reaching this conclusion, two established interpretations of this statutory phrase were relied upon. It was found that the deposit would not justify a prudent man in further expenditure of his time and money in an effort to develop a paying mine; and, in view of the common nature of the minerals involved, it was also found that the mineral could not presently be extracted, removed and marketed at a profit.

Petitioners filed actions in the United States District Court for Nevada against local officers of the Department of the Interior, seeking to reverse the administrative decisions. The district court granted summary judgment for the defendants; the court of appeals vacated those judgments because of procedural error; on the authority of an intervening court of appeals decision disapproving the present "marketability" standard, *Coleman* v. *United States,* 363 F. 2d 190 (C.A. 9), affirmed on rehearing, 379 F. 2d 555, the trial court then reversed the decision of the Secretary of the Interior as to all claims. When the cases again came before the court of appeals, its *Coleman* decision had been reversed by this Court. *United States* v. *Coleman,* 390 U.S. 599. Recognizing that the basis for the trial court's reversal of the departmental decisions had been eliminated, the court of appeals examined the record, concluded that the administrative findings were supported by substantial evidence and reversed with directions to enter judgments for the defendants.

ARGUMENT

1. Petitioners' contention that use of the "present marketability" test in connection with the "prudent man" standard is invalid because the former test was never published in the Federal Register (Pet. 4–6) is an attempt to relitigate the issues settled last Term in *Coleman.* As was shown in the *Coleman* argument, the "present marketability" test has been applied for nearly four decades (see the Petition in No. 630, O.T. 1967, p. 7 and Petitioner's Brief, *id.,* at pp. 14–15).

The court of appeals correctly recognized as this Court's holding in *Coleman* that "the so-called 'present marketability' test is a logical complement to the 'prudent man' test and an appropriate way to identify, with greater precision and objectivity, the factors relevant to a determination that a mineral deposit is 'valuable.' " That is, the test is a permissible administrative interpretation and application of the statutory requirement of "valuable mineral deposits" and hence is not required to be stated in the Federal Register by the Administrative Procedure Act, 5 U.S.C. 552.

2. In attacking the "present marketability" standard as unconstitutionally "vague, indefinite and uncertain" (Pet. 6), petitioner proves too much; his analysis seems equally applicable to the even more general term "valuable mineral deposits" used in the statute. But dollars and cents precision is not required. In the exercise of its plenary authority over the public domain, Congress has delegated broad authority to the Secretary of the Interior to implement its policy as to disposal of such lands. *Best* v. *Humboldt Mining Co.*, 371 U.S. 334; *Boesche* v. *Udall*, 373 U.S. 472. The standards he has adopted are consistent with the congressional scheme and sufficiently precise to inform administrative judgment and enable meaningful judicial review. No more is or could be required.

3. There is nothing in proceedings below to indicate that the Common Varieties Act of 1955, as amended, 69 Stat. 368, 30 U.S.C. 611, was applied retroactively in this case.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1969.

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IN THE

Supreme Court of the United States

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REPLY TO THE BRIEF FOR FEDERAL OFFICERS IN OPPOSITION.

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REPLY TO THE BRIEF FOR FEDERAL OFFICERS IN OPPOSITION.

Statement.

The Department of the Interior, through its attorneys have filed a brief in opposition to our petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit in the above cases.

This reply is an answer to the points raised in said brief in opposition.

ARGUMENT.

1. The Department of the Interior states in its brief in opposition (page 3, paragraph 1):

> "Petitioner's contention that use of the 'present marketability' test in connection with the 'prudent man' standard is invalid because the former test was never published in the Federal Register (Pet. 4-6) is an attempt to relitigate issues settled last Term in *Coleman.*"

Petitioner is not attempting to relitigate the issues in *Coleman.*

The *Coleman* case grew out of an eviction suit filed Aug. 8, 1963 and a cross-complaint thereto asking for judicial review of administrative proceedings.

Dredge Corporation's complaint in Case #366 *was filed February 3, 1961,* and its complaint in Case #396 *was filed September 8, 1961.*

Both of these Dredge cases are for judicial review after all administrative remedies had been exhausted.

Therefore, Dredge Corporation's two cases were filed before the *Coleman* case was started. We are following our judicial remedies and have no connection with the *Coleman* case.

This Court in *Coleman* said that the "marketability at a profit" test was a logical complement to the "prudent man" test. This Court did not rule on whether the "marketability at a profit" test ***had been published*** in the Federal Register, as required by the Administrative Procedure Act, (5 U.S.C. 552) or if this test was legal under the present circumstances, of not having been published.

The issue of the requirement to publish in the Federal Register was never raised in the *Coleman* case on appeal and therefore this point has not been ruled on by this Court in *Coleman*.

No judgment can go beyond the issues in the case, therefore, to deny Dredge Corporation the right to have this issue determined by this Court would be a denial of due process of law.

2. The Department of the Interior in its brief in opposition states (page 3, paragraph 1):

> "As was shown in the Coleman argument the 'present marketability' test has been applied for nearly four decades . . ."

The facts and court decisions do not sustain that statement.

The "prudent man" test in use since 1894 has been approved by the Supreme Court of the United States several times, one of the latest decisions being *Best v. Humboldt Mining Company,* 371 U.S. 334 (January 4, 1963). There is no reference in that decision by this Court to "marketability at a profit."

The Department of the Interior *admits* in its brief in opposition (on page 4) that the test of marketability at a profit had never been published in the Federal Register.

> "That is, the test is a permissible administrative interpretation and application of the statutory requirement of 'valuable mineral deposits' and hence is not required to be stated in the Federal Register by the Administrative Procedure Act, 5 U.S.C. 552."

Petitioner suggests that this *additional* requirement of "marketability at a profit" without being spelled out by a regulation, properly published in the Federal Register, is an attempt by the Department of the Interior to administratively destroy petitioner's rights to its mining claims—contrary to the Constitution. To add administratively imposed non-statutory requirements to the mining laws is contrary to law and justice.

The Department of the Interior in its brief in opposition states (page 4, paragraph 2):

> "In the exercise of its plenary authority over the public domain, Congress has delegated broad authority to the Secretary of the Interior to implement its policy as to disposal of such lands. *Best v. Humboldt Mining Co.*, 371 U.S. 334; *Boesche v. Udall*, 373 U.S. 472. The standards he has adopted are consistent with the congressional scheme and *sufficiently precise to inform administrative judgment* and enable meaningful judicial review. *No more is or could be required.*" (Emphasis added).

The standards adopted by the Department of the Interior may be sufficient to inform "administrative judgment" but the Administrative Procedure Act requires more. It requires that the *public* shall be informed and that the Department *must publish* its intentions in the Federal Register so those opposed may have an opportunity to object. This is the only way that abuse of administrative authority can be curbed and is one of the principal reasons for enactment of the Administrative Procedure Act.

The Department of the Interior has acknowledged in administrative decisions that the Administrative Procedure Act applies to cases involving that Department. In *United States v. Heirs of John D. Stack, et al.,* A-28157 (March 28, 1960), it was held:

> "The Administrative Procedure Act is binding upon the Department of the Interior in proceedings covered by its provisions unless and until it is repealed or superseded by further legislative action or invalidated by a court of law."

In *United States v. E. M. Johnson, et al.,* A-30191 (April 2, 1965), the Department held:

> "Although Departmental decisions may be included in the volumes published as Decisions of the Department of the Interior, they may be cited as precedents in proceedings under the Administrative Procedure Act since they are available for public inspection pursuant to published Departmental regulations, which is in accordance with Section 3 of that Act."

For what reason does the Department of the Interior refuse to follow the law and comply with the provisions of the Administrative Procedure Act, requiring *publication of an intended regulation.*

Does the Department feel that its activities would be limited if it is required to inform the public of its requirements in the location and patenting of mining claims?

Can it be considered proper and fair for the Department to operate unchecked except by its own conscience and follow standards that are "sufficiently precise to

inform administrative judgment" but not to inform the public?

Mining claims have been held by this Court to be "property in the fullest sense of the term" (*Emil L. Krushnic v. United States,* 380 U.S. 305 (1930).) Can property rights be thus destroyed by "administrative judgment" without compensation to the owner?

What *is* required to comply with the requirements of the Department of the Interior; what requirements are in effect today and what will be changed by tomorrow, without knowledge to the public or the mine owner?

This is the reason for the requirement of publication by the Administrative Procedure Act *so the public may know* what is required to successfully hold title to mining claims.

The United States Court of Appeals for the District of Columbia struck down the District of Columbia's general vagrancy law and narcotic vagrancy law in the case of *Hattie Mae Ricks,* as yet unreported.

In reversing the conviction under a narcotics and vagrancy charge, the Appeals Court opinion, written by Judge Spottswood W. Robinson, said

> "each of the statutory provisions upon which appellant's conviction rests as so vague as to infringe rights secured by the Fifth Amendment.
>
> 'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violated the first essential of the due process of law,' Judge Robinson said.
>
> This rule applies to the test of 'Marketability at a profit.' "

3. The Department of the Interior states in its brief (page 4, paragraph 3):

> "3. There is nothing in proceedings below to indicate that the Common Varieties Act of 1955, as amended 69 Stat. 368, 30 U.S.C. 611, was applied retroactively in this case."

The consolidated decision of the Secretary of the Interior in the case of Clear Gravel Corporation and the Dredge Corporation, dated December 29, 1959, states as follows (page 4, paragraph 1):

> "As to claims located for sand and gravel, discovery, including marketability, must be demonstrated prior to withdrawal of the land from location for the common varieties of sand and gravel effected by the Act of July 23, 1955" (50 U.S.C. 1958, Sec. 601, *et seq.*).

If the Dredge mining claims are saved from the provisions of the above Act by its own terms, that said Act applies only to claims "hereafter located," why is discovery limited to before the Act was passed—why not after? Why mention the Act at all if it does not apply, by its terms, to these claims?

Conclusion.

For these reasons petitioner respectfully requests that its petition for a writ of certorari be granted.

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